Canadian Rights Offerings Given a Confirmatory Green Light to Cross the U.S. Border

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The Division of Corporate Finance of the U.S. Securities and Exchange Commission (the "Commission") recently issued a no-action letter confirming that it would not object to Canadian reporting issuers using Form F-7 to register rights offerings pursuant to the recently revamped prospectus exemption. The Form F-7 is a prescribed form comprising two pages that "wrap around" a Canadian offering document, and is filed with the Commission under the U.S. *Securities Act of 1933*. The Form F-7 is effective upon filing.

This decision may prove to be beneficial both to U.S. shareholders, who may be offered the opportunity to participate in discounted offerings by Canadian issuers, as well as to the issuers who wish to access capital from their U.S. shareholders. When considered alongside the amendments made by the Canadian Securities Administrators to the exempt rights offering regime in late 2015, the Commission's decision should serve as a further step toward reinvigorating this capital raising mechanism.

Background

A rights offering is a method of financing that gives a reporting issuer's existing securityholders the right to acquire additional securities of the issuer on a proportional basis, typically at a discount to the market price. The previous Canadian rights offering exemption, which was set forth in now repealed National Instrument 45-101 — *Rights Offerings*, had in recent years largely fallen out of use due to the restrictions imposed by the rule on the size of offerings and the length of time required to clear rights offering circulars through securities regulators.

Recognizing the need to make the rights offering exemption more utilitarian, section 2.1 of National Instrument 45-106 —*Prospectus Exemptions* (the "Rights Offering Exemption") was amended. The amendments offered several enhancements to the old regime, including a streamlined offering process by which issuers are required to deliver a notice of the offering to shareholders, as opposed to a circular, and an increased dilution limit of 100% of the issuer's outstanding securities. Issuers wishing to take advantage of the prospectus exemption are still required to prepare a circular for the

offering and file it on SEDAR, but they are no longer required to have it reviewed by securities regulators or distributed to shareholders.

The Impact of the Amendments on U.S. Securityholders

While clearly a move in the right direction from the perspective of raising capital in Canada, none of the more than 30 rights offerings made under the Rights Offering Exemption were registered in the U.S. Historically, eligible Canadian issuers were able to register their rights offerings in the U.S. using a registration statement on Form F-7. Form F-7 was adopted by the Commission as part of the Multijurisdictional Disclosure System ("MJDS"), upon the realization that many foreign issuers were bypassing the U.S. with their rights offerings because of the inconvenience associated with having to comply with more than one regulatory regime. The Commission came up with a compromise by allowing eligible Canadian issuers to rely on domestic disclosure documents to register their offerings.

The recent paucity of prospectus exempt rights offerings being extended to U.S. investors has been attributed by some industry participants to uncertainty over whether the Form F-7 is still applicable given that the offering circular and notice required pursuant to the Rights Offering Exemption is no longer reviewed by Canadian securities regulators.

Through its "no-action" letter dated February 1, 2017, the Commission has removed this uncertainty and, based on representations made to it, confirmed that it has no objection to the use of Form F-7 to register under the U.S. *Securities Act of 1933* a rights offering conducted in Canada by a Canadian reporting issuer under the Rights Offering Exemption. The Commission came to this conclusion based on the assumptions that an issuer utilizing the form would:

- be up to date in its Canadian continuous disclosure filings; and
- include, with the Form F-7 filing, the notice and circular that the issuer would still be required to file with the Canadian securities regulators.

This decision is in alignment with a policy objective of the Form F-7 regime which was always intended to defer to the home jurisdiction with respect to adequate oversight and disclosure.

Using Form F-7 to Register Canadian Rights Offerings in the U.S.

Registration of the offering using Form F-7 is available to any issuer that is not an investment company registered under the *Investment Company Act of 1940*, that:

1. is incorporated or organized under the laws of Canada or any province or territory;
2. is a foreign private issuer under U.S. securities laws;
3. has had a class of its securities listed on a major Canadian exchange for the 12 months immediately preceding the filing of the Form; and

4. has been subject to the continuous disclosure requirements of any securities regulatory authority in Canada for at least 36 calendar months immediately preceding the filing of the Form, and is currently in compliance with obligations arising from such listing and reporting.

A Canadian issuer considering registering its rights offering in the U.S. using Form F-7, should also consider the following requirements:

- the rights must be offered to U.S. securityholders on terms that are no less favourable than those offered to other holders of the same class of securities; and
- the disclosure documents included with the Form may be prepared in accordance with the requirements of the issuer's home jurisdiction, but must include a series of legends specifically intended for U.S. shareholders.

Supplementary documents that have previously been filed with the Commission may be incorporated by reference into an issuer's Form F-7. In addition, supplementary documents relevant to the transaction that have been publicly filed in Canada must be filed as exhibits on EDGAR, but do not need to be sent to U.S. shareholders.

Conclusion

Since the changes to the Canadian rights offering exemption at the end of 2015, there have been no prospectus exempt rights offerings that have taken advantage of the Form F-7 registration statement in the U.S.

We anticipate that Canadian issuers and their U.S. securityholders, alike, will welcome the recent pronouncement by the Commission of its position that eligible Canadian issuers undertaking rights offerings in reliance upon the Rights Offering Exemption may use Form F-7 to register the offerings in the U.S. This may lead to an increase in the number of prospectus exempt rights offerings that do not prohibit U.S. shareholders from participating in the offering. This would not only serve to enfranchise U.S. securityholders but it may result in more money being raised!

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